STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 23, 2005
v	No. 255430 Genesee Circuit Court
SANTOS MANUEL PEREZ, Defendant-Appellant.	LC No. 03-012572-FH

Before: Sawyer, P.J., and Markey and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (sexual penetration of a thirteen-year-old victim), and fourth-degree criminal sexual conduct, MCL 750.520e(1)(a) (sexual contact with a thirteen-year-old victim by a defendant more than five years older). He was sentenced to concurrent prison terms of 30 to 180 months for the third-degree CSC conviction and 12 to 24 months for the fourth-degree CSC conviction. He appeals as of right. We affirm.

I

Defendant's CSC convictions arise from an incident that occurred in his apartment on August 16, 2003. Defendant's girl friend, Leila Kenner, Kenner's daughter, Amanda Kenner, and the victim, Amanda's friend, were spending the night at defendant's apartment. The victim slept on the sofa. During the night, defendant touched the victim's breasts and put his fingers in her vagina. The victim told both Amanda and Leila, and reported the incident to the police. Police Lieutenant Christopher Swanson questioned defendant in custody, and defendant stated that he mistakenly believed that the person he touched on the sofa was Leila. Defendant also called Leila's mother, Cristina Vickers, on the morning after the incident, and told her repeatedly that there had been a case of "misidentity." When Leila confronted defendant about it, he first denied it, but then said that if he did it, he thought it was Leila.

Defendant moved to suppress his statement to Lieutenant Swanson, claiming that Swanson continued to question him after he asserted his right to counsel. At a *Walker*[1] hearing on defendant's motion, Swanson acknowledged that defendant requested an attorney a few minutes into the interview, but claimed that he spent the next twenty minutes answering defendant's questions about how the case would proceed. Swanson did not record this portion of the interview, because defendant was not about to give a statement. At the end of the twenty-minute period, defendant decided to give a statement, which Swanson then recorded.

Defendant denied asking Swanson questions about case procedure during the twenty minutes preceding his recorded statement. Defendant testified that Swanson urged him "to be straight up" so that Swanson would know whether to pursue the case as "a cold blooded molestation, or a mistake of identity." Otherwise, defendant would be charged with first-degree CSC. Swanson assured defendant that he did not seem like a child molester. Defendant stated that Swanson was the first to speak after defendant requested counsel.

The trial court determined that Swanson did not reinitiate the custodial interrogation after defendant asserted his right to an attorney and, therefore, denied defendant's motion to suppress.

II

Defendant contends that the trial court erred in denying his motion to suppress his statement to Lieutenant Swanson. When a defendant claims that his statement should have been suppressed because the police did not honor his request for counsel, this Court reviews the record de novo, but reviews the trial court's factual findings under the clearly erroneous standard. *People v Adams*, 245 Mich App 226, 230; 627 NW2d 623 (2001).

Both the United States and Michigan Constitutions guarantee the right against compelled self-incrimination. US Const, Am V; Const 1963, art 1, § 17. This right encompasses an accused person's right to cease a custodial police interrogation by asserting his right to counsel. *Adams, supra* at 230-231. When an accused invokes the right to have counsel present during a custodial interrogation, the accused cannot be subjected to further police questioning until counsel has been made available, unless the accused initiates further communication. *Id.* at 237; see also *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981). A suspect's request for counsel does not terminate all communication between the police and the suspect; rather, it prohibits police-initiated custodial interrogation. *People v Kowalski*, 230 Mich App 464, 472, 474, 478; 584 NW2d 613 (1998). Interrogation includes express questioning or its "functional equivalent," which "includes 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.' " *Id.* at 479, quoting *Rhode Island v Innis*, 446 US 291, 300-301; 100 S Ct 1682; 64 L Ed 2d 297 (1980).

Here, although defendant testified that Swanson continued to interrogate him after he requested counsel, the trial court gave credence to Swanson's testimony that he ceased asking

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

questions and limited the discussion to only responding to defendant's questions about procedural matters until defendant indicated that he wanted to give a statement. Defendant contends that Swanson was not credible, but we defer to the trial court's findings of fact, especially its resolution of credibility disputes. Because Swanson's testimony indicates that he properly ceased questioning defendant until defendant decided to give a statement, the trial court did not clearly err in denying defendant's motion to suppress.

III

Defendant next argues that the trial court erred in permitting four witnesses, Swanson, Amanda Kenner, Leila Kenner, and Cristina Vickers (also referred to as Cristina Austin), to testify that the victim told them that defendant assaulted her. Defendant claims that this testimony was inadmissible hearsay.[2]

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v Chavies*, 234 Mich App 274, 281; 593 NW2d 655 (1999). However, a statement is not hearsay if

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . . [MRE 801(d)(1)(B).]

Hearsay is not admissible except as provided by the rules of evidence. MRE 802; *Chavies*, *supra*.

Defendant argues that the trial court erred in admitting the challenged testimony under the excited utterance exception, MRE 803(2), because the victim was no longer under the stress of the startling event when she made the statements, and the statements were made at a time when she had the capacity to fabricate an accusation. However, the trial court did not admit the statements under MRE 803(2), but instead determined that they were admissible under MRE 801(d)(1)(B). Defendant does not address the trial court's ruling with respect to MRE 801(d)(1)(B). Defendant's failure to address this necessary issue precludes appellate relief.

[2] Before trial, the prosecutor indicated that he "anticipated[d]" calling Amanda Kenner to testify that the victim told her about the incident. He asserted that the testimony was admissible under MRE 803(2), the excited utterance exception to the hearsay rule. The trial court decided that the prosecutor should make an offer of proof after the victim testified. After the victim testified, the trial court decided that no offer of proof would be necessary, and instead sua sponte determined that the proffered testimony was not hearsay under MRE 801(d)(1)(B) and that the applicability of the excited utterance exception did not matter. Because the prosecutor raised the issue before it arose, and because the trial court decided the issue without argument, we regard this issue as properly preserved with respect to all four witnesses. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

Roberts & Son Contracting, Inc v North Oakland Dev Corp, 163 Mich App 109, 113; 413 NW2d 744 (1987).

IV

Defendant argues that the trial court erred in instructing the jury that his alleged mistake of identity was not a defense to the crime charged.[3] Defendant preserved this issue by objecting to the trial court's instruction. MCL 768.29; *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). This Court reviews jury instructions in their entirety to determine whether there is error requiring reversal. *Id.*

We have not located any Michigan authority addressing mistake of fact in the context of the complainant's identity in a CSC case. Defendant argues that his alleged mistake negates the requisite mens rea for CSC, because he did not purposefully touch the victim. He relies on *People v Piper*, 223 Mich App 642, 646-647; 567 NW2d 483 (1997), in which this Court held that intentional touching of the complainant's intimate parts is not itself sufficient to establish guilt of second-degree CSC, MCL 750.520c, because the statute also requires proof that the intentional contact could reasonably be construed as being for a sexual purpose. Defendant argues that because he mistakenly touched the wrong person, he did not intentionally touch MA for a sexual purpose. The prosecutor argues that the alleged "mistake of identity" in this case is really a mistake concerning the victim's age, which is not a defense to statutory rape as codified in the CSC statutes. *People v Cash*, 419 Mich 230, 242; 351 NW2d 822 (1984). In this case, however, defendant does not contend that his touching of MA could not reasonably be construed as being for a sexual purpose, and his alleged mistake concerns the victim's identity, not her age. Therefore, the parties' reliance on these authorities is misplaced.

It has been stated that "a reasonable mistake of fact is a defense to a charge of crime where it negates the intent component of the crime." 21 Am Jur 2d, Criminal Law, § 152, p 232. Mistake of fact may be a defense even if the offense charged requires proof of only general intent. *Id.* In order for a mistake of fact to be the basis of a valid defense, three elements must be satisfied: (1) The mistake must be honest and reasonable; (2) the mistake must be a mistake of fact, not of law; and (3) the mistake "must negate the culpability required to commit the crime or the existence of the mental state which the statute prescribes with respect to an element of the offense." *Id.* at 232-233.

To the extent defendant's alleged mistake of fact was honest and reasonable, it could be considered a mistake of fact that would negate the culpability required to commit the crime. Although the prosecutor correctly asserts that mistake of fact regarding a victim's age does not negate culpability for CSC offenses predicated on the victim's age, see *People v Cash*, 419 Mich 230, 234; 351 NW2d 822 (1984), defendant's mistaken identity scenario involves more than a mistake of fact concerning age. Defendant does not contend that he engaged in sexual contact with an underage victim in the mistaken belief that she was of legal age. Rather, he contends

[3] Defendant also argues that the trial court erroneously denied his pretrial motion to present this defense.

that he engaged in sexual contact with a female in the mistaken belief that she was actually another person, who was old enough to consent. Thus, there is merit to defendant's claim that if he could show that he acted with the honest and reasonable belief that he was touching Leila, he would not be culpable of the CSC offenses predicated on sexual contact with an underage person. (Under other circumstances, mistake of identity would not be a defense, e.g., if the CSC charge was based on force or coercion.) But even if the trial court erred in instructing the jury that defendant's alleged mistake of identity was not a defense to the crimes charged, and by denying defendant's pretrial motion to present this defense, we conclude that the error was harmless.

A preserved constitutional error does not require reversal if it was harmless beyond a reasonable doubt. *People v Anderson* (*After Remand*), 446 Mich 392, 405; 521 NW2d 538 (1994). As previously indicated, a mistake of fact is not a defense to a crime unless the mistake was honest and reasonable. 21 Am Jur 2d, Criminal Law, § 152, p 232. In this case, the victim testified that she was asleep on the sofa when she felt defendant touching her breasts and putting his hands down her pants. She pushed him away and told him to stop. He left, but according to the victim, then returned. The victim claimed that she was sleeping with her front against the back of the sofa, but defendant turned her over, touched her breasts, put his hand in her pants, and digitally penetrated her vagina. Defendant, however, did not admit to a second incident or vaginal penetration. He testified that he fell asleep while he and Leila were sitting on the floor, leaning against the sofa. When he woke up, he reached with his arm and touched someone he believed to be Leila. When he heard an unfamiliar voice, he got up, went into the bedroom, and found Leila there.

It is apparent that the jury believed the victim's testimony, and disbelieved defendant, because defendant denied engaging in sexual penetration, yet the jury convicted him of third-degree CSC, which requires proof of penetration, in addition to convicting him of fourth-degree CSC, which only requires proof of sexual contact. Because defendant's testimony was the only factual basis for a mistaken identity defense, and because it is clear beyond a reasonable doubt that the jury disbelieved defendant's testimony, any error in failing to instruct the jury on defendant's mistaken identity defense was harmless beyond a reasonable doubt.

V

Defendant argues that the trial court erred in denying his motion for a new trial because the evidence was not sufficient to support his conviction. We assume that defendant is challenging the great weight of the evidence, because a conviction should be reversed without a new trial when the evidence is legally insufficient. *People v Jasman*, 92 Mich App 81, 87; 284 NW2d 496 (1979). Defendant preserved this issue by moving for a new trial pursuant to MCR 2.611(A)(1)(e). *People v Noble*, 238 Mich App 647, 657; 608 NW2d 123 (1999).

MCR 2.611(A)(1)(e) provides that the trial court may grant a new trial where the jury's verdict was against the great weight of the evidence. This Court reviews the trial court's decision for an abuse of discretion. *People v Stiller*, 242 Mich App 38, 49; 617 NW2d 697 (2000). The appropriate test "is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). In *People v Lemmon*, 456 Mich 625, 643-644;

576 NW2d 129 (1998), our Supreme Court recognized only a narrow exception to the general principle against granting a new trial based on questions of witness credibility, i.e., when the witnesses' testimony contradicts indisputable physical facts or laws, when it is patently incredible or defies physical realities, or when it is so inherently implausible that a reasonable juror could not believe it.

Defendant argues that the jury's verdict was against the great weight of the evidence because there was no physical evidence corroborating the victim's testimony that he digitally penetrated her vagina. Although Dr. Alan Janssen testified that the victim's genitalia did not show any signs of trauma, he also testified that sexual assault victims rarely present signs of physical injury. Thus, this is not a case where the absence of physical evidence contradicts a witness' testimony or defies physical realities. Furthermore, a complainant's uncorroborated testimony is sufficient to convict a defendant of CSC. MCL 750.520h; *Lemmon, supra* at 632 n 6. Therefore, the jury's verdict was not contrary to the great weight of the evidence and the trial court did not abuse its discretion by denying defendant's motion.

VI

Defendant argues that the trial court erred by failing to correct inaccurate information in the presentence investigation report ("PSIR").

Defendant's PSIR states, under the Evaluation and Plan section, "As a result of this offense [the victim] underwent a CSC examination. She was afraid of the defendant and this will have a lasting effect on her. The defendant disputes the lasting effect." Defendant objected to these statements at sentencing. He argued that the CSC examination was performed solely to obtain evidence, not to provide a medical diagnosis or treatment, and that there was no record evidence that the victim was traumatized by the incident. After defendant stated his objection, the trial court responded, "All right," and addressed the scoring of the sentencing guidelines. Defendant now argues that the trial court concurred with his claim that the PSIR contained inaccurate information, and that the challenged statements should have been stricken from the report.

A sentencing court must respond to challenges to the accuracy of information in the PSIR, but has wide latitude in responding to these challenges. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). We review the trial court's response for an abuse of discretion. *Id.*

Defendant interprets the trial court's response of, "All right," as a concurrence to his claim that the information was inaccurate and argues that the case must be remanded for correction of the PSIR. This Court has previously rejected a defendant's argument that the response, "all right," constitutes an agreement with the defendant's objections to the PSIR where it is not clear from the record that the trial court actually did agree. *People v Hoyt*, 185 Mich App 531, 536; 462 NW2d 793 (1990). Here, considered in conjunction with the trial court's other comments at sentencing, it is apparent that the court did not agree with defendant's challenge.

When the trial court scored offense variable (OV) 3, MCL 777.33 (physical injury to the victim), defendant reiterated his argument that the CSC examination mentioned in the PSIR was for evidentiary, not medical, purposes. Defendant does not dispute that the victim underwent an examination, but rather objects to the implication that she required medical attention because he inflicted an injury on her. The trial court resolved this issue when it scored ten points for OV 3. Considered against this backdrop, defendant's objection is not to the factual accuracy of the statement in the PSIR, but to the interpretation of that statement, particularly in regard to the scoring of OV 3. The trial court appropriately addressed defendant's objection by concluding that the examination was, "in a broad sense," medical treatment. The trial court's inference that the CSC examination constituted a medical procedure, irrespective of its evidentiary purpose or value, does not reflect a finding that the PSIR contained inaccurate information. Consequently, there was no basis for striking the statement from the PSIR.

Defendant also objected to the statement that the assault will have a "lasting effect" on the victim, arguing that there was no record evidence that the victim was traumatized. The trial court agreed that there was no objective evidence of trauma, and therefore declined to assign points under OV 4, MCL 777.34 (psychological injury to victim), but did not strike the statement. Under the circumstances, however, defendant was not entitled to have the statement stricken as containing inaccurate or irrelevant information. This statement does not purport to convey objective, ascertainable information, but rather makes a restrained and reasonable prediction that the victim will suffer some enduring effect from the assault. The PSIR further acknowledges that defendant disputes the lasting effect. Consequently, the trial court did not err in failing to strike the statement.

VII

Defendant argues that the trial court erred in assigning ten points for OV 3, physical injury to the victim. Defendant preserved this issue by objecting to the scoring at sentencing. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); see also MCR 6.429(C). This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), lv gtd on other grounds 471 Mich 913 (2004). A trial court's scoring decision will be upheld if there is any evidence in the record to support it and the trial court's factual findings are not clearly erroneous. *Id.*; MCR 2.613(C).

MCL 777.33(1)(d) provides that OV 3 should be scored at ten points if "[b]odily injury requiring medical treatment occurred to a victim." The phrase "requiring medical treatment" refers to "the necessity for treatment and not the victim's success in obtaining treatment." MCL 777.33(3). Defendant argues that the victim did not require medical treatment, but underwent an examination only to obtain evidence. Because no evidence was presented that the victim had any medical need for the examination, we agree that OV 3 was improperly scored at ten points. However, contrary to defendant's argument, there was sufficient evidence to score five points for OV 3 on the basis that "[b]odily injury not requiring medical treatment occurred to a victim." MCL 777.33(1)(e). The victim's testimony that the penetration was painful was sufficient to establish bodily injury. *Houston, supra* at 471. Thus, the trial court should have scored only five points for OV 3.

The trial court's error in scoring ten points instead of five was harmless, however, because it did not affect defendant's guidelines range. Correcting the OV 3 score reduces defendant's total offense variable level score from twenty to fifteen points. Third-degree CSC, MCL 750.520d, is a class B felony. MCL 777.16y. Regardless whether defendant's offense variable level score is fifteen or twenty points, defendant still falls at offense variable level II for class B offenses, MCL 777.63, and his guidelines range remains thirty to fifty months. An erroneous score that does not affect the guidelines range does not require resentencing. *Houston*, *supra* at 473.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Christopher M. Murray